Comments on AORs 2004-38 and 39

October 25, 2004

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Requests 2004-38 and 2004-39

Dear Mr. Norton:

These comments are filed on behalf of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in regard to both AOR 2004-38 and AOR 2004-39. The former is a request submitted by the National Republican Senatorial Committee (NRSC) on behalf of Senate candidate Rep. George Nethercutt and his campaign committee, seeking advice on raising funds to pay for recount expenses if a recount should occur in the 2004 State of Washington Senate race. The latter is a request submitted by the Washington State Republican Party seeking advice on the rules that apply to its activities in the case of the same eventuality – a recount in the 2004 Senate race.

Since both requests concern the same subject and are to be considered by the Commission jointly, we submit consolidated comments on the two requests.

In our discussion below, we emphasize the following conclusions:

First, the Commission has long taken the position that funds spent for recount purposes are "in connection with" a federal election. Under 2 U.S.C. § 441(i)(e) – newly enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA) – nonfederal funds cannot be solicited or spent by a federal candidate or officeholder "in connection with" a federal election. Thus, this prohibits Rep. Nethercutt from soliciting or spending nonfederal funds for recount purposes.

Second, Commission regulations require a state party to spend only federal funds, or allocated federal and nonfederal funds, for all activities "in connection with a Federal election." 11 C.F.R. § 300.30(b)(3)(iii). Since activities by a state party related to a recount of a federal election are "in connection with" an election, but are not allocable, they must be funded entirely with funds from a Federal account.

Third, the Commission has erroneously taken the position that recount activities are not "for the purpose of influencing" a federal election, even though they are "in connection with" an election. This interpretation defies common sense, and the Commission should

"for the purpose of influencing" a federal election, and therefore must be funded by state parties exclusively with hard money.

We appreciate the opportunity to comment on this matter.

Sincerely,

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reconsider its position. Properly construed, the law requires funds raised and spent for recount activities to be both "contributions" and "expenditures," and therefore subject to the hard money contribution limits and source prohibitions that apply to both federal candidates and political parties.

1. The application of BCRA to the solicitation of recount funds by federal candidates.

The NRSC request on behalf of Rep. Nethercutt can be disposed of most directly by applying section 441i(e)(1) of BCRA to longstanding Commission precedent on the funding of recounts. Section 441i(e)(1)(A) prohibits a federal candidate (or officeholder) from soliciting or spending nonfederal funds "in connection with" a federal election. The Commission's precedent (applying its existing recount regulation at 11 C.F.R. § 100.91) treats recount expenses as funds "in connection with" a federal election. Thus, the newly adopted BCRA provision prohibits Rep. Nethercutt or his campaign committee from raising or spending nonfederal money for recount expenses.

Even though this question can be disposed of on these grounds under BCRA, we believe, as noted above, that the Commission additionally should reconsider its precedent, which is based on a view that funds spent for recounts of federal election are not "for the purpose of influencing" those elections. This position is simply nonsensical. It is difficult to conceive of funds that are more directly aimed at "influencing" an election than those funds spent to determine the actual *winner* of the election. The Commission has an obligation to ensure that its interpretations of the law comport with the statute and with common sense. In this area, it has failed, and ought now to rectify that failure.

A. Recount funds are "in connection with" an election. The Commission has long taken the position that a federal candidate can raise donations from individuals for recount expenses without those funds being subject to the contribution limits in 2 U.S.C. § 441a. The Commission has, however, treated funds raised for recount purposes as subject to 2 U.S.C. § 441b, which prohibits corporate or union contributions, and to 2 U.S.C. § 441e, which prohibits contributions from foreign nationals. This position is set forth in 11 C.F.R. § 100.91 (stating that money donated "with respect to a recount of the results of a Federal election...is not a contribution except that the prohibitions of 11 C.F.R. 110.20 and part 114 apply").[1]

BCRA, however, provides that a federal candidate or officeholder, or any entity directly or indirectly established, financed, maintained or controlled by a candidate or officeholder shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office" unless the funds "are subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(e)(1)(A).

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[1] A comparable provision exempts recount funds from the definition of "expenditure," again with the proviso that the prohibitions on corporate or union funds, and funds from foreign nationals, apply. 11 C.F.R. § 100.151.

the state party for such purposes are "contributions." As such, they are subject to the contribution limits and source prohibitions of the Act.

C. Solicitations for recount funds raised by other groups. The NRSC request seeks advice on whether Rep. Nethercutt can solicit funds for other "recount entities," AOR 2004-38 at 2, "such as State party non-Federal accounts, or Internal Revenue section 501(c) and 527 organizations." *Id.*

This question is also controlled by section 441i(e)(1), which governs solicitation of funds by federal candidates and officeholders. For the reasons set forth above, the Commission has long taken the position that recount funds are "in connection with" a federal election, the same standard that is applied through section 441i(e). Thus, Rep. Nethercutt may solicit such funds only if they comply with the contribution limits and source prohibitions of the Act, whether the recipient is an entity he controls himself, or an "outside" entity such as a state party committee or other section 527 organization. In short, Rep. Nethercutt may *not* solicit nonfederal funds for a state party or a section 527 group, for recount purposes.[5]

The only exception provided by section 441i(e) applies to funds solicited for a section 501(c) group. Under certain circumstances, the statute permits a federal candidate or officeholder to solicit non-federal funds for a section 501(c) group, if the organization does not have a "principal purpose" to conduct certain "federal election activities," and if the solicitation is "general."[6]

The question of whether nonfederal recount funds can be solicited to such a group is, however, besides the point, since an incorporated section 501(c) group could not *spend* funds for recount activities. Because, as the Commission has long held, recounts are "in connection with" federal elections, funds spent to influence recounts are governed by 2 U.S.C. § 441b. *See* 11 C.F.R. § 100.151 (funds spent for recount purposes are subject to the prohibitions of part 114). Thus, an incorporated section 501(c) group could not spend funds with respect to a recount, even if such funds could be solicited by a federal candidate.

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[5] This limitation on fundraising for a state party account is of course subject to the provisions of section 441i(e)(3), which permit a federal candidate to "attend, speak, or be a featured guest" at a state party fundraising event. Although a Commission regulation permits a candidate to speak "without restriction or regulation" at such events, 11 C.F.R. § 300.64(b), that provision was recently declared invalid by the federal district court for the District of Columbia in *Shays v. FEC*, No. 02-1984 (CKK) (Op. of Sept. 18, 2004) (appeal pending).

[6] Thus, any such solicitation could not mention that the funds will be spent for the purpose of recount activities, as the supplemental request letter asks. *See* AOR 2004-38 Supplemental Letter of October 15, 2004 at 2. Further, if the section 501(c) recount entity is "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" Rep. Nethercutt, it would be directly subject to the restrictions of section 441i(e)(1), and could not solicit any nonfederal funds for recount purposes.

This provision applies to recount funds. And it applies for reasons that the general counsel's office set forth at length in late 2002, when the newly enacted provisions of BCRA had just gone into effect.

On October 30, 2002, one week before the effective date of BCRA, the four congressional campaign committees – the DSCC, DCCC, NRSC and NRCC – all submitted an unusual joint request for an advisory opinion, seeking advice on the impact of BCRA on recount funds. The general counsel prepared two draft opinions for consideration by the Commission at its meeting on November 14, 2002, and publicly released those drafts on November 12, 2002. The next day, November 13, 2002, the campaign committees withdrew their AOR, so the Commission never ruled on the matter. *See* In the Matter of AOR 2002-13 (Nov. 14, 2002).

In a memorandum accompanying the two draft opinions, Agenda Document 02-79 (Nov. 12, 2002), the general counsel's office recommended the adoption of one of the opinions – Draft A – over the other. We believe the conclusion of Draft A – that a federal officeholder cannot solicit nonfederal funds for recount purposes – is correct, and should be followed by the Commission in this matter.

Draft A explains that the existing recount regulations, which date back to 1977, are based on the position that while recount funds are not "for the purpose of influencing" a federal election, and thus not subject to section 441a, such funds are "in connection with" a federal election, and thus subject to sections 441b and 441e. Draft A states in regard to the Commission's existing regulations:

> These regulations implicitly recognize that while payments for a recount or election contest are not "for the purpose of influencing a Federal election" and therefore such payments are not "contributions" or "expenditures" under the Act, payments for a recount are "in connection with a Federal election," and therefore trigger the prohibitions on being funded by national banks, corporations and labor organizations in 2 U.S.C. 441b and foreign nationals in 2 U.S.C. 441e....
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> The rationale for the Commission's long-standing regulation is revealed by a close examination of the relevant statutory provisions. Contributions that are subject to the 2 U.S.C. 441a limits are by definition funds provided "for the purpose of influencing" a Federal election. Contributions and expenditures that are subject to the 2 U.S.C. 441b prohibitions on corporate or labor organization funds or the 2 U.S.C. 441e prohibition on foreign national funds need only be "in connection with" a Federal election. Consequently, the Commission concluded that while funds for recount expenses are "in connection with" a Federal election so they cannot include corporate or labor organization funds, they are not "for the purpose of influencing" the election, so they are not subject to the contribution limits or reporting requirements.
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> Agenda Doc. 02-79 (Draft A) at 6-7 (emphasis added).

apply to recount funds. Agenda Doc. 02-79 (Draft B) at 13. Of course, if this is right, then there is no statutory basis for applying sections 441b or 441e to recount funds either, as Commission regulations have long done. Thus, this analysis rejects the approach of the Commission's longstanding regulation. Further, the logical conclusion of the Draft B analysis is that federal candidates, including publicly financed presidential candidates, could solicit and receive *unlimited corporate and union treasury funds, as well as unlimited donations from foreign nationals* for recount purposes. This would be an absurd result that is plainly and flagrantly contrary to not only to BCRA but to FECA as well.

B. Recount funds are "for the purpose of influencing" an election. Even though AOR 2004-38 can be decided on the ground set forth above, the Commission should take this opportunity to reconsider its position on recount funds.

The Commission's 1977 regulation is incorrect. Recount funds are, and always should have been treated as, "for the purpose of influencing" a federal election, and thus subject to the contribution limits of section 441a as well as the source prohibitions of sections 441b and 441e. So doing would dispose of the issues raised in both the NRSC and Washington State Republican party requests. Funds spent for recount purposes would be "expenditures" and "contributions" under FECA. Even apart from the operation of section 441i(e) of BCRA, a Senate candidate (and state party) could raise only federally compliant funds for such purposes.

The Commission's position to the contrary simply makes no sense. Unlike the redistricting process – which is related to, but not a part of, an election – a recount is an integral part of the election process itself. If a candidate hires an attorney to provide legal oversight to the process of casting and counting ballots in the candidate's election on Election Day, that surely would be considered an "expenditure" by the candidate, to be funded only with hard money by the campaign. Similarly, spending by a candidate on a recount effort to determine who actually won the election should be treated as an "expenditure" by the candidate as well.[4]

It is of course correct that a recount is not, in itself, an "election" as defined in 2 U.S.C. § 431(1). But neither is a television advertisement an "election," or a campaign rally, or a get-out-the-vote drive. Each of these activities is part of the candidate's efforts to influence the outcome of the "election." Precisely the same is true of a recount. The activities paid for by a candidate with regard to a recount are efforts to influence the outcome of an "election," in this case, a general election as defined in section 431(1)(A).

Because funds spent on recount activities are "for the purpose of influencing" an "election," they are by definition "expenditures," and the funds raised by Rep. Nethercutt or

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[4] The recount process is typically characterized by candidates, their representatives, and party operatives each attempting to ensure a complete count of all "valid" votes, invalidate improperly cast ballots, and ensure that the final tally of votes is free from error. Candidates and parties undertake recount activities for the specific purpose of ensuring that the candidate's lead will be protected, or their opponent's lead will be eroded, during the recount process.

Section 441i(e)(1) of BCRA requires that funds raised and spent by a Federal candidate "in connection with" an election must be subject to all of the prohibitions and limitations of the Act, *including the section 441a contribution limits*. Since the Commission's existing regulation is based on the view that recount funds are "in connection with" an election, the requirements imposed by BCRA in section 441i(e)(1) necessarily apply to recount funds – and thus the contribution limits in section 441a now necessarily apply to such funds as well.

This is precisely the conclusion reached by the general counsel's office in its recommended draft:

> Congress's choice of the "in connection with" standard in 2 U.S.C. 441i(e) prohibits a Federal candidate's solicitation, receipt, direction, transfer or disbursement of funds not subject to the limits, prohibitions and reporting requirements of the Act, even for recounts. To conclude otherwise, the Commission would have to determine that expenses for recounts are not "in connection with" the Federal election whose results are subject to recount. The Commission's determination that recount expenses are "in connection with" the relevant Federal election is dictated by the logic and the plain language of BCRA, particularly in light of the Commission's regulation dating back to 1977 that is premised on the conclusion that recounts and election contests are in connection with Federal elections. Therefore, Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more Federal candidates or officeholders, are prohibited by 2 U.S.C. 441i(e)(1) from soliciting, receiving, directing, transferring, or spending funds for a recount unless those funds are subject to the limitations, prohibitions, and reporting requirements of the Act.
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> Agenda Doc. 02-79 (Draft A) at 15-16
> (emphasis added)[2]

We agree with this conclusion, and we urge the Commission to adopt it. Furthermore, we agree with the general counsel's conclusion in Draft A that the basic $2,000 contribution limit on individuals under section 441a(a)(1) would apply to donations to a recount fund. *Id.* at 17.[3]

The alternative analysis set forth in the 2002 Draft B – and *disfavored* by the general counsel – is plainly wrong and should be rejected here. That analysis concludes that "recounts are not elections under the Act" and therefore section 441i(e) of BCRA does not

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[2] The Draft further noted that to the extent the existing regulations are inconsistent with this conclusion, "the Commission intends to reevaluate the continuing viability of these rules in a subsequent rulemaking." *Id.*

[3] This is in response to the question posed in the NRSC request as to which contribution limit would apply to recount funds raised by Rep. Nethercutt. AOR 2004-38 at 2.